

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



H

Application No. **16553-H** of the **George Washington University**, pursuant to 11 D.C.M.R. § 3104.1, for a **special exception** for the review and approval of the University Foggy Bottom Campus Plan – Years **2000-2010** under Sections 210 and 507.

**HEARING DATE:** May 6, 2003

**DECISION DATE:** May 6, 2003

**ORDER DENYING MOTION FOR STAY**

**Preliminary Matters.** Following the Board's March 29, 2001 final Order in this proceeding, the **George Washington University** ("University") filed a petition for review with the District of Columbia Court of Appeals. It also filed a civil action in the United States District Court for the District of Columbia against the Board, its members, the District of Columbia, and Mayor Anthony Williams. On June 15, 2001 the district court issued a **preliminary injunction preventing enforcement** of Condition No. 9 of the March 29, 2001 Board Order during academic year 2001-2002, or until further order of the court.

After the issuance of the **preliminary injunction** by the district court, the Office of the Corporation Counsel, with the **consent of the Board**, filed a motion in the District of Columbia Court of Appeals to **remand the case to the Board** for further consideration of the Board's decision in light of the **preliminary injunction**. On July 31, 2001, the Court of Appeals remanded the case **without limitation** as to the scope of the remand proceeding. The Board held **evidentiary hearings on September 17 and 21, 2001**, issued a proposed Order, and then a **Final Order on Remand**, effective January 23, 2002, that incorporated and **adopted the March 29, 2001 Order, except as revised**.

The University again sought a **preliminary injunction** before the district court and the parties filed **cross motions for summary judgement**. On April 12, 2002, the district court issued a memorandum and order finding that all of condition 9 (except the **unchallenged reporting requirement**) and condition 10 violated substantive due process. However, no injunction was issued, without prejudice to a renewed motion should the Board fail or threaten to fail to honor the rulings.

The University also sought review of the **Final Order on Remand** in the District of Columbia Court of Appeals. On May 20, 2002, the Court, acting on a joint motion, consolidated the University's two **appeals** and held them in abeyance pending

developments in the federal courts. These appeals did not move forward again until nearly a year later, after February 4, 2003, the date of the decision of the United States Court of Appeals rejecting the University's constitutional claims. See *George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003). In the interim, the University did not seek any relief from this Board until after the District of Columbia Court of Appeals denied its motion for a stay in that forum without prejudice should the Board deny a subsequently made University request for a stay.

On April 1, 2003 the University filed a motion requesting a stay of enforcement of Conditions 9 and 10 of the Final Order on Remand pending review by the District of Columbia Court of Appeals. By memorandum dated April 2, 2003, the Office of Zoning informed the parties that the Board would consider the motion at its regularly scheduled public meeting on May 6, 2003, with responses to the University's motion due April 15, 2003 and the University's reply due April 22, 2003. On April 14, 2003, ANC 2A requested an extension until April 23, 2003 so that the motion could be considered at the ANC's regularly scheduled monthly meeting on April 22, 2003. The University did not object to the extension, provided that its reply could also be filed one week past the deadline set by the Board. At its May 6, 2003 public meeting, the Board received into the record both the ANC's response, filed April 23, 2003, and the University's reply, filed April 30, 2003.

Motion for stay. The University asserts that "enforcement of Conditions 9 and 10 today would require the University to acquire immediately over 1,000 beds in neighborhoods outside of Foggy Bottom, in the middle of an academic year, when all of the University's undergraduates are already housed." Further, according to the University, "those beds would only theoretically be able to be used, if at all, for one academic year, *i.e.*, until the Fall of 2004, when the University's expedited construction of all of the on-campus beds required under the Order [*i.e.*, the Final Order on Remand] is scheduled to be complete." The University asserts that it "has attempted in good faith to develop the number of beds called for in the BZA order," but that "despite its expedited construction efforts, the University is unable to immediately comply with these requirements. . . ." The University contends that "[i]mmediate enforcement of such punitive measures will in no way advance the BZA's goal of increasing the number of on-campus beds constructed by the University."

In opposing the motion for stay, ANC 2A asserts that the University has had ample opportunity to comply with the Board's Final Order on Remand but has instead continued to enroll additional students, making compliance now more difficult. The ANC also argues that the University is unlikely to "lose its latest attempt to challenge this Board's order before the D.C. Court of Appeals. . . ." By a vote of 3-2-1 at its public meeting on April 22, 2003, ANC 2A adopted a resolution opposing the University's motion for stay on grounds including that "the reasons and difficulties outlined in the Motion do not justify the failure of the University to comply with the Order."

In its reply, the University again asserts its "extensive efforts to comply with the BZA's housing requirements" and rejects the ANC's claim that "enforcing Conditions 9 and 10 at this stage of the proceedings, pending the Court of Appeals' decision on this matter, will in anyway further the BZA's stated objectives." The University also contends that its continued development of [ion-residential projects, in parallel with its development of on-campus housing, would not affect its ability to comply, or the timeliness of compliance, with the BZA's housing requirements, citing especially "the much-needed (and long-planned) new School of Business" and "the serious impact on the school if it is precluded from beginning construction."

To prevail on a motion for stay pending appeal, the party seeking the stay must demonstrate that it is likely to prevail on the merits of the appeal, that irreparable injury will result if the stay is denied, that the composing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. *See Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340,344 (D.C. 1988) (administrative agency required to consider the four specified factors in considering a motion for a stay). For the reasons discussed below, the Board concludes that the University has not satisfied its burden of proof with respect to its requested stay, and therefore the motion to stay enforcement of Conditions 9 and 10 is denied.

The University has not demonstrated that it is likely to prevail on the merits in the case pending before the D.C. Court of Appeals. The Board has reviewed the brief filed on its behalf before the District of Columbia Court of Appeals. Based on that review, the Board believes that the Final Order on Remand is being vigorously defended and is likely to be affirmed.

Nor has the University demonstrated that irreparable injury will result if the stay is denied, notwithstanding its assertion that the conditions are delaying construction of its "much needed" business school and have prevented issuance of a certificate of occupancy for an expansion of the art school. The University is perhaps inconvenienced – but is not irreparably harmed – by enforcement of the conditions of approval of its campus plan. The Board is not persuaded by the University's repeated references to the "immediate" nature of the requisite compliance. The University has had ample time to pursue compliance with Conditions 9 and 10, and could have avoided the need to start "immediately" by taking additional steps to achieve compliance earlier.

Essentially, the University argues that despite its good faith efforts, the conditions are not capable of being complied with. This argument, if true, should be made to the Zoning Commission as part of a request to amend the campus plan due to unforeseen hardship preventing compliance with the conditions, including the interim measures set forth in the Final Order on Remand to phase in the requirements of Conditions 9 and 10. It is not a proper basis for granting a stay.

Conversely, the interests of opposing parties would be harmed by a stay, and, for the same reasons, the public interest **does not favor** granting of a stay. Conditions 9 and 10 are integral to the campus plan **conditionally approved** by the Board in its Final Order on Remand as a means to protect the **continued** viability of the permanent residential community in the Foggy Bottom/West End area. The conditions at issue focus the University's attention and **resources on providing** the requisite additional student housing on campus, or outside the Foggy Bottom/West End area during the interim period, and attempt to restrain the **University's expansion and** attendant conversion of permanent residential buildings in nearby **off-campus neighborhoods** to student housing. The public interest and the interests of the opposing parties in preventing further expansion of university use into the **surrounding community** off-campus remain, and militate against the grant of the requested stay.

The public interest also favors denial of **the** requested stay in light of the Board's interest in upholding the validity of its prior **orders** and **re** affirming its decision to approve the University's campus plan subject to **certain** conditions. The requested stay would preclude enforcement of those **conditions**, thereby undermining the Board's decision and allowing the University to proceed **with** nonresidential projects on campus without consequence for its noncompliance **with** the conditions adopted by the Board to ensure that the approved campus **plan** was **consistent** with the requirements of § 210 of the Zoning Regulations.

For the reasons stated above, the **Board** concludes that the University has not met its burden of proof. It is hereby **ORDERED** that the motion for a stay is **DENIED**.

**VOTE: 3-1-1** (Geoffrey H. **Griffis**, Carol J. Mitten, and David A. **Zaidain** to deny the motion; Curtis L. Etherly, Jr. opposed; one vacancy.)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

Each concurring member has **approved** the issuance of this Decision and Order and authorized the undersigned to **execute this** Decision and Order on his or her behalf.

**ATTESTED BY:**

  
**JERRILY R. KRESS, FAIA**  
Director, Office of Zoning

**FINAL DATE OF ORDER:** MAY 19 2003

UNDER 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN **DAYS** AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6 OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE **PARTIES**. MN/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**BZA APPLICATION NO. 16553-H**

As Director of the Office of Zoning, I hereby certify and attest that on **MAY 19 2003** a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Maureen E. Dwyer, Esquire  
Shaw Pittman  
2300 N Street, NW  
Washington, D.C. 20037-1128

Elizabeth Elliott, Chairperson  
Advisory Neighborhood Commission 2A  
c/o St. Mary's Court  
724 24<sup>th</sup> Street, NW  
Washington, D.C. 20037

Maria Tyler, Commissioner  
Single Member District 2A03  
949 25<sup>th</sup> Street, NW  
Washington, D.C. 20037


Barbara Spillinger  
2500 Virginia Avenue, NW  
Washington, D.C. 20037

James McLeod  
2424 Pennsylvania Avenue, Suite 407  
Washington, D.C. 20037

Richard Sheehey, Commissioner  
Single Member District 2A01  
2000 F Street, NW, Suite 207  
Washington, D.C. 20006

Alan Bergstein  
Office of the Corporation Counsel  
441 4<sup>th</sup> Street, N.W., 7<sup>th</sup> Floor  
Washington, DC 20001

ATTESTED BY:

  
JERRILY R. KRESS, FAIA  
Director, Office of Zoning